MANU/SC/0121/1979

Equivalent/Neutral Citation: AIR1979SC1369, 1979CriLJ1045, 1979 INSC 66, (1980)1SCC98, (1980)SCC(Cri)35, [1979]3SCR532

IN THE SUPREME COURT OF INDIA

Writ Petition No. 57 of 1979

Decided On: 09.03.1979

Hussainara Khatoon and Ors. **Vs.** Home Secretary, State of Bihar, Patna

Hon'ble Judges/Coram:
D.A. Desai and P.N. Bhagwati, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: K. Hingorani, Adv

For Respondents/Defendant: U.P. Singh, Adv.

JUDGMENT

P.N. Bhagwati, J.

1. This writ petition again comes up for hearing before us pursuant to the directions given by us on 26th February, 1979 and today three additional counter-affidavits have been Sled on behalf of the respondents: one by Mrinmaya Choudhri, Assistant Inspector General of Prisons; the other by Bageshwari Prasad Pande, Superintendent of the Patna Central Jail and the third by Pradip Kumar Ganguly, Superintendent of the Muzaffarpur Central Jail. Mrinmaya Choudhri has in his affidavit given particulars of the under-trial prisoners in 48 jails in the State of Bihar in addition to the particulars of the under-trial prisoners in 17 jails already submitted on 26th February, 1979. We directed the State of Bihar by our order dated 26th February, 1979 Reported in MANU/SC/0119/1979 : 1979CriLJ1036 to file a revised chart showing a yearwise breakup of the under-trial prisoners after making a division into two broad categories viz. minor offences and major offences but this direction has not yet been carried out by the State of Bihar: Mrinmaya Choudhri has, however, assured us in his affidavit that several steps regarding the different directions given by the court are being promptly implemented but due to shortage of time it has not been possible to complete the same by 3rd March, 1979. We direct that the State of Bihar will file within three weeks from today a revised chart in regard to the under-trial prisoners in all the 65 jails in a manner which would clearly show yearwise as to what is the date from which each of them is in jail after making a broad division into two categories of minor offences and major offences. We are glad to note that so far as women under "protective custody" are concerned, the State has assured us in the affidavit of Mrinmaya Choudhri that necessary steps for transferring women under 'protective custody' in jails to the institutions run by the welfare department, have been taken and directions to that effect are issued by the Government. We hope and trust that this direction given by us in our earlier order dated 26th February, 1979 will be carried out by Government and compliance report submitted to us within the prescribed time.

2. Though we directed the State of Bihar by our order dated 26th February, 1979 to intimate to the court by a proper affidavit to be filed on or before 3rd March, 1979

whether the under-trial prisoners whose particulars were given to the counter-affidavit filed on 26th February, 1979 were periodically produced before the Magistrates in compliance with the proviso to Section 167(2), we find that the only averment made by Bageshwari Pd. Pande in Ms affidavit in response to this direction is that petitioners Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 17 confined in the Patna Central Jail prior to their release were regularly produced before the courts 'as and when required by the courts'. This averment does not at all constitute compliance with the direction given by us, We would like to know from the State of Bihar in a proper affidavit to be filed within two weeks from today whether the under-trial prisoners who were directed to be released by us on their personal bond were periodically produced before the Magistrate in compliance with the requirement of the proviso to Section 167(2). We would suggest that the State should furnish to this Court the dates on which these under-trial prisoners were remanded to judicial custody from time to time by the Magistrates, so that we can satisfy ourselves that the requirement of the proviso was complied with.

3. We also find an averment in the affidavit of Pradeep Kumar Ganguly that petitioners Nos. 10, 11, 12, 13, 15, 16 and 18 who were previously confined in the Muzaffarpur Central Jail prior to their release were regularly produced before the Court 'as and when required by the courts'. This averment, as we have pointed out, is wholly unsatisfactory and it does not inform the Court as to what were the dates on which these under-trial prisoners were remanded from time to time by the Magistrates. It is only if these particulars are furnished to us that we can satisfy ourselves in regard to compliance with the requirement of the proviso to Section 167(2) and we would, therefore, direct the State of Bihar to furnish these particulars to us in an affidavit to be filed with-in two weeks from today.

4. We should also like to have the particulars in regard to the dates on which remand orders were made from time to time by the Magistrates in regard to under-trial prisoners at items Nos. 4 to 8, 13, 21, 22, 24, 38, 20, 30, 43, 56, 69, 71, 72, 79, 85, 92, 96, 07, 101, 129, 133, 136 to 142, 165 to 167, 170 to 174, 177, 191, 199, 210 and 236 in the list of wader-trial prisoners in Ranchi Central Jail submitted on behalf of the respondents. These under-trial prisoners have been in jail for a period of over six to seven years and we would like to satisfy ourselves that the requirement of the proviso to Section 167(2) was complied with in their case. The affidavit giving these particulars should be filed by the State Government within three weeks from today. There are quite a large number of under-trial prisoners who are languishing in jail for long periods of time and it is not possible for us to examine the individual cases of these under-trial prisoners for the purpose of satisfying ourselves in regard to compliance with the proviso to Section 167(2), but we would request the High Court of Patna to pick out a few names from the lists of under-trial prisoners which have been filed before us by the State of Bihar on 26th February, 1979 and 5th March, 1979 and satisfy itself whether these under-trial prisoners have been periodically remanded from time to time by the Magistrates as required by the proviso to Section 167(2). We would direct the State of Bihar to furnish copies of these lists of under-trial prisoners to the Chief Justice of the Patna High Court within ten days from today.

5. We find from the lists of under-trial prisoners filed before us on behalf of the State of Bihar that the under-trial prisoners whose names are set out in the chart filed by Mrs. Hingorani today have been in jail for periods longer; than the maximum term for which they could have been sentenced, if convicted. This discloses a shocking state of affairs and betrays complete lack of concern for human values. It exposes the callousness of our legal and judicial system which can remain unmoved by such enormous misery and suffering resulting from totally unjustified deprivation of personal liberty. It is indeed

difficult for us to understand how the State Government could possibly remain oblivious to the continued incarceration of these under-trial prisoners for years without even their trial having commenced. The Judiciary in the State of Bihar also cannot escape its share of blame because it would not have been unaware of the fact that thousands of under-trial prisoners are languishing in jail awaiting trial which never seems to commence We fall to see how the continued detention of these under-trial prisoners mentioned in the list of Mrs. Hingorani can be justified when we find that they have already been in jail for a period longer than what they would have been sentenced to suffer, if convicted. They have in fact some jail term to their credit We, therefore, direct that these under-trial prisoners whose names and particulars are given in the list filed by Mrs. Hingorani should be released forthwith as continuance of their detention is clearly illegal and in violation of their fundamental right under Article 21 of the Constitution.

6. Then there are several under-trial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that under-trial prisoners who are produced before the Magistrates are un-aware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that be- half. Sometimes the Magistrates also refuse to release the under-trial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the under-trial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pretrial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have revoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nationwide legal service programme to provide free legal services to them. It is now well settled, AS a result of the decision of this Court in Maneka Gandhi v. Union of India, MANU/SC/0133/1978 : [1978]2SCR621 that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair sad 'Just', Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the courts process that he should have legal services available to him. This Court pointed out in M.H. Hoskot v. State of Maharashtra, MANU/SC/0119/1978 : 1978CriLJ1678 : "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise , and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side, Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer--power for steering the wheels of equal justice under the law". Free legal services to the poor and the needy is an essential element of any 'reasonable, fair and just' procedure. It is not necessary to quote authoritative pronouncements by judges and jurists in support of the view that without the service of a lawyer an accused person would be denied 'reasonable, fair and just' procedure. Black, J., observed in Gideon v. Wainwright, (1963) 372 US 335: 9 L Ed 799:

> Not only these precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any perm held into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for Mm. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed who fail to hire the beat lawyers they can get to prepare and present, their defences. That Government hires lawyers to procedure and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him,

The philosophy of free legal service as an essential element of fair procedure is also to be found in the following passage from the judgment of Douglas, J. in Jon Richard Argersinger v. Raymond Hamlin, (1972) 407 US 25: 32 L Ed 530:

> The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence," even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish, his innocence.

<u>If that be true of men of intelligence, how more true is it of the ignorant and illiterate or those of feeble intellect.</u>

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries but it is in ours. From the very beginning our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

x x x

The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a

lawyer should be appointed... The court should consider the individual factors peculiar to each case. These, of course would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case.

(emphasis added)

7. We may also refer to Article 39-A the fundamental constitutional directive which reads as follows:

> 39-A. Equal justice and free legal aid: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

This Article also emphasises that free legal service is an unalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer. We would, therefore, direct that on the next remand dates, when the under-trial prisoners, charged with bailable offences, are produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on be half of such under-trial prisoners and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad outlines set out by us in our judgment dated 12th February, 1979. The State Government will report to the High Court of Patna its compliance with this direction within a period of six weeks from today.

8. There are also various under-trial prisoners who have been in jail for periods exceeding one-half of the maximum punishment that could be awarded to them if convicted, for the offences with which they are charged. To take an example, Budhu Mahli, who is at item No. 1 in the list of under-trial prisoners in Ranchi Central Jail has been in jail since 21st November, 1972 for offences under Section 395 of the Indian Penal Code and Section 25 of the Indian Arms Act. The maximum punishment for the offence under Section 395 of the Indian Penal Code is 10 years while that for the offence under Section 25 of the Indian Arms Act is much less. Yet Budhu Mahli has been in jail as an under-trial prisoner for over six years. So also Jairam Manjhi, Somra Manjhi, Jugal Minda and Gulab Munda at Items Nos. 2 to 7 in the list of under-trial prisoners confined in Ranchi Central Jail have been in jail as under-trial prisoners from 21st February, 1974 that is, for a period of over five years for the offence under Section 395 of the Indian Penal Code which is punishable with maximum term of imprisonment of ten years. There are numerous other instances which can easily be gleaned from the lists of under-trial prisoners filed on behalf of the State of Bihar, where the under-trial prisoners have been in jail for more than half the maximum term of imprisonment for which they could be sentenced, if convicted. There is no reason why these under-trial prisoners should be allowed to continue to languish in jail, merely because the State is not in a position to try them within a reasonable period of time. It is possible that some

of them, on trial, may be acquitted of the offence charged against them and in that event, they would have spent several years in jail for offences which they are ultimately found not to have committed. What faith would these people have in our system of administration of justice? Would they not carry a sense of frustration and bitterness against a society which keeps them in jail for so many years for offences which they did not commit? It is, therefore, absolutely essential that persons accused of offences should be speedily tried, so that in cases where bail, in proper exercise of discretion, is refused, the accused persons have not to remain in jail longer than is absolutely necessary. Since there are several under-trial prisoners who have been in jail for periods longer than half the maximum term of imprisonment for which they could, if convicted, be sentenced, we would direct that on the next remand dates when they are produced before the Magistrates or the Sessions Courts, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail and opposing remand provided that no objection is raised to such lawyer on their behalf and if any application for. bail is made, the Magistrates or the Sessions Courts, as the case may be, should dispose of the same in accordance with the broad guidelines indicated by us in our judgment dated 12th February, 1979. The State Government will comply with this direction as far as possible within a period of six weeks from today and submit report of compliance to the High Court of Patna.

9. We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across 'law for the poor" rather than law of the poor'. The law is regarded by them as something mysterious and forbidding--always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker section of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services. We may remind the Government of the famous words of Mr. Justice Brennan:

> Nothing rankles more in the human heart than a brooding sense of injustice, Illness we can put up with. But injustice makes us want to pull things down. When, only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness.

and also recall what was said by Lee-man Abbot years ago in relation to affluent America:

> If ever a time shall come when to this city only the rich, can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the courtroom, the seeds of revolution wall be sown, the fire-brand of revolution will be lighted and put into the bands of men and they will almost be justified in the revolution which will follow.

We would strongly recommend to the Government of India and the State Governments that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the constitutional directive embodied in Article 39-A.

10. We find from the counter-affidavit filed on behalf of the respondents that no reasons have been given by the State Government as to why there has been such enormous delay in bringing the under-trial prisoners to trial, Speedy trial is, as held by us in our earlier judgment dated 26th February, 3.979, an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and it is the constitutional obligation of the State to devise such a procedure as would ensure speedy trial to the accused. The State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources, to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial, The State may have its financial constraints and its priorities in expenditure, but, as pointed out by the Court in Rhem v. Malclm, 377 F Supp 995: 'The law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty". It is also interesting to notice what Justice, then Judge, Blackmum said in Jackson v. Bishop, 404 F Supp 571:

> Humane considerations and constitutional requirements are not, in this day, to be measured by dollar considerations....

So also in Holt v. Sarver, 309 F Supp 362 affirmed in 442 F Supp 362, the Court, dealing with the obligation of the State to maintain a Penitentiary System which did not violate the Eighth Amendment aptly and eloquently said:

> Let there be no mistake in the matter, the obligation of the respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed upon what respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, an a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment' of additional Judges and other measures calculated to ensure speedy trial. We find that in fact the courts in the United States have adopted this dynamic and constructive role so far as the prison reform is concerned by utilising the activist magnitude of the Eighth Amendment. The courts have ordered substantial improvements to be made in a variety of archaic prisons and jails through decisions such as Holt v. Sarver (supra), Jones v. Wittenberg, 330 F Supp 707; Newman v. Alabama, 349 F Supp 278 and Gates v. Collier, 349 F Supp 881. The Court in the last mentioned case asserted that it 'has the duty of fashioning a decree that will require defendants to eliminate the conditions and practices at Parchman hereinabove found to be violative of the United States

constitution' and in discharge of this duty gave various directions for improvement of the conditions of those confined in the State Penitentiary. The powers of this Court in protection of the constitutional rights are of the widest amplitude and we do not see why this Court should not adopt a similar activist approach and issue to the State directions which may involve taking of positive action with a view to securing enforcement of the fundamental right to speedy trial. But in order to enable the Court to discharge this constitutional obligation, it is necessary that the Court should have the requisite information bearing on the problem. We, therefore, direct the State of Bihar to furnish to us within three weeks from today particulars as to the location of the courts of Magistrates and courts of Sessions in the State of Bihar together with the total, number of cases pending in each of these courts as on 31st December, 1978 giving yearwise break-up of such pending cases and also explaining why it has not been possible to dispose of such of those cases as have been pending for more than six months. We would appreciate if the High Court of Patna also furnishes the above particulars to us within three weeks from today since the High Court on its administrative side must be having records from which these particulars can be easily gathered. We also direct the State of Bihar to furnish to us within three weeks from today particulars as to the number of cases where first information report have been lodged and the cases are pending investigation by the police in each sub-division of the State as on 31st December, 1978 and where such cases have been pending investigation for more than six months, the State of Bihar will furnish broadly the reasons why there has been such delay in the investigative process. The writ petition will now come up for hearing and final disposal oil 4th April, 1979. We have already issued notice to the Supreme Court Bar Association to appear and make its submissions on the issue arising in the writ petition since they are of great importance. We hope and trust that the Supreme Court Bar Association will respond to the notice and appear to assist the Court at the hearing of the writ petition.